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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re J.C., a Person Coming Under the
Juvenile Court Law.

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

J.A.,

Defendant and Appellant.

E048817

(Super.Ct.No. J215571)

OPINION

APPEAL from the Superior Court of San Bernardino County. Wilfred J.
Schneider, Jr., Judge. Affirmed.

Neil R. Trop, under appointment by the Court of Appeal, for Defendant and
Appellant.

Ruth Stringer, County Counsel, and Sandra D. Baxter, Deputy County Counsel,
for Plaintiff and Respondent.

Appellant J.A. (father) appeals the termination of his parental rights under Welfare and Institutions Code section 366.26¹ as to his minor son, J.C. Father claims his parental rights were terminated in violation of his right to due process because the record does not include clear and convincing evidence he was an unfit parent. He also claims the trial court erred when it found the parental benefit exception in section 366.26, subdivision (c)(1)(B)(i), did not apply because the record shows he has a beneficial relationship with J.C.

FACTUAL AND PROCEDURAL BACKGROUND

On June 18, 2007, at the age of four months, J.C. and his half brother, who was about 20 months old, were removed from the custody of their mother because of her mental health problems. Mother had previously been diagnosed with schizophrenia and had eight other children removed from her care because of her poor mental health. Mother and J.C.'s half brother are not involved in the current appeal, so factual information related to them will only be included to the extent it is relevant to father's appeal. Although father lived with mother and the two boys beginning in 2005, his whereabouts were unknown at the time of the detention.

On June 20, 2007, a dependency petition was filed alleging J.C. fell within section 300, subdivision (b). As later amended, the petition alleged mother has a history of mental illness and could not provide adequate care and supervision, mother and father had engaged in multiple physical altercations that resulted in injury to both,

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

and father's ability to parent and protect J.C. was questionable. The court detained both children, and they were placed together in foster care with foster parents who were willing and able to adopt.

In an initial interview with a social worker on July 5, 2007, father admitted paternity as to J.C. but said he was unsure about J.C.'s half brother. On July 12, 2007, the court ordered genetic testing to determine the paternity of both children. The parents were allowed supervised visitation of one hour per week. The court ordered reunification services for father as to J.C. only after testing confirmed he was J.C.'s biological father. An initial case plan was established as of September 6, 2007. At the jurisdictional hearing on September 11, 2007, the court found the allegations in the petition to be true, as amended. On September 18, 2007, the court approved liberalized visitation with father, including unsupervised overnight visits if deemed appropriate by the social worker.

In the six-month review report dated March 18, 2008, the social worker said father appeared "eager and motivated," had been attending counseling sessions, and was enrolled in a parenting class. Father began unsupervised visitation on February 25, 2008. However, it was reported father was not in a position to regain custody because he had not completed services, had not accepted responsibility for his role in the removal of the children, and did not have a suitable home or child care plan. Six more months of services was recommended. At the six-month review hearing on April 2, 2008, the court found there was a substantial probability J.C. could be returned to father's custody within 18 months of removal.

In a report prepared in anticipation of the 12-month review hearing on August 18, 2008, the social worker said father “appears to be trying hard to do what is right for his son,” but “his capacity to appropriately parent, on a full time basis, remains unknown.” According to the social worker, more liberalized visitation would provide “an opportunity to more accurately assess the situation.” At that time, father was living in a mobile home with other adults, and background checks were completed for these individuals “resulting in no hits.” Father completed the counseling and education components of the case plan and began two-hour visitation with J.C. at his home on June 23, 2008. J.C. went willingly at first but as visits progressed, he became agitated and tearful as he approached father’s car. More liberalized visits were scheduled to begin on August 11, 2008, from 10:30 a.m. to 5:30 p.m.

At the 12-month review hearing on August 18, 2008, the court concluded returning J.C. to the parents’ custody at this point would create a substantial risk of detriment. However, the court also found father made substantial progress toward alleviating or mitigating the reasons necessitating placement and there was a probability J.C. could be returned home within the statutory time frame of 18 months. Reunification services and weekly unsupervised visits with father were continued.

On November 26, 2008, the foster parents for J.C. and J.C.’s half brother made a request for de facto parent status as to J.C. In their application, the foster parents stated that: “This child has a three-year old brother that he is with 24 hours a day. They sleep in the same room, eat, bathe, and play together. We feel it would be a great

disservice to split these brothers.” The court granted the request for de facto parent status on November 26, 2008.

On December 5, 2008, in anticipation of the 18-month review hearing, the social worker filed a report recommending the termination of reunification services to father and the setting of a permanency hearing pursuant to section 366.26. The reasons for the recommendation were the child’s lack of attachment to father and father’s instability. According to the social worker, there was ample time and opportunity through unsupervised visitation for the child to develop a significant attachment to father, but J.C. demonstrated distress and clingy behavior when leaving the foster mother and regressive behavior upon his return to the foster home after visits. The social worker also had concerns about father’s housing and employment. In addition, the social worker reported an incident involving a suspicious bruise near J.C.’s ear, which could have occurred during father’s visitation. This was followed by other minor injuries to the child that happened during a separate visit to father’s home and were not promptly reported to the social worker.

At the 18-month review hearing, father requested a contested hearing on the recommendation to terminate reunification services. On January 29, 2009, February 4, 2009, and February 5, 2009, the court heard testimony by father, the social worker, and J.C.’s child care provider, as well as extensive arguments by counsel concerning the issues raised in the social worker’s report of December 5, 2008, and in an addendum filed January 16, 2009. On February 5, 2009, the court found father failed to participate regularly and to make substantive progress on the case plan. In reaching

this conclusion, the court's main concern was evidence indicating J.C. was not bonding with father. For the reasons outlined in the social worker's report, the court also concluded the extent of father's progress in alleviating or mitigating the reasons for placement was insufficient. The court found there was no probability J.C. could be returned to father within the statutory time frame, terminated reunification services to father, and set a section 366.26 hearing to consider the termination of parental rights.

The social worker filed an adoption assessment on May 6, 2009, recommending termination of parental rights and adoption as the permanent plan. The assessment concluded J.C. was attached to his foster parents and viewed them as parental figures. J.C. was considered adoptable because of his young age and because of the foster parents' willingness to adopt him. J.C.'s relationship with his older brother was also considered as part of the assessment. The two children had always lived together and had been placed with the same foster parents for more than a year. The foster parents intended to adopt and raise the children together. The social worker's assessment of the foster parents was very positive.

On July 15, 2009, the court heard testimony by father and the social worker. The court found J.C. was likely to be adopted, terminated parental rights, and selected adoption as the permanent plan. In addition, the court concluded the parental benefit exception did not apply, because father had not satisfied his burden of showing the nature and extent of the parental bond outweighed the child's need for stability and permanence.

DISCUSSION

Due Process

Citing *In re P.C.* (2008) 165 Cal.App.4th 98 (*P.C.*) and *In re G.S.R.* (2008) 159 Cal.App.4th 1202 (*G.S.R.*), father contends his right to due process was violated because there is no legitimate basis in the record to support a finding by clear and convincing evidence that he was an unfit parent at the time his parental rights were terminated. In *P.C.* and *G.S.R.*, parental rights were terminated and the children involved were found to be adoptable. However, the appellate courts reversed the orders terminating parental rights, because there was an insufficient basis in the record to find the parents unfit despite repeated findings by the juvenile court that it was detrimental to return the children to the parents. (*P.C.*, at p. 106; *G.S.R.*, at p. 1215.) In both of these cases, poverty and an inability to obtain suitable housing were the only reasons the children were not returned to the appealing parent. (*P.C.*, at p. 106; *G.S.R.*, at p. 1215.)

Father believes his case is analogous to *P.C.* and *G.S.R.* because the court's findings of detriment during the course of the proceedings are not supported by clear and convincing evidence of unfitness as required by principles of due process. Although the court sustained the allegation in the petition that he engaged in multiple physical altercations with mother, father contends this did not show he was unfit because there was no finding or evidence to suggest the child's safety was ever threatened or at risk because of domestic violence. In addition, father claims the only

other finding at the time of the jurisdictional hearing was that his ability to parent was “questionable.”

Even if it could be said he was unfit at the time of the jurisdictional hearing, father argues the termination of parental rights must be based on present circumstances, and there is no evidence in the record to show he was unfit at the time his parental rights were terminated. By this time, the issues with mother had long been resolved, and the court made favorable findings at the six- and 12-month review hearings that he was complying with his case plan. Similar to *P.C.* and *G.S.R.*, father believes the court terminated his reunification services and his parental rights solely because of poverty and because J.C. was more comfortable with the foster parents. According to father, the child’s level of comfort in a foster home was given too much weight and cannot eliminate the requirement of parental unfitness as a prerequisite to termination of parental rights.²

We review an order denying reunification services or terminating parental rights for substantial evidence. (*In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154.) “ ‘In making this determination, we must decide if the evidence is reasonable, credible, and of solid value, such that a reasonable trier of fact could find the court’s order was proper based on clear and convincing evidence. [Citation.]’ ” (*In re Harmony B.*

² As respondent contends, father has forfeited his right to specifically or individually challenge the propriety of findings or orders at the detention, jurisdictional, dispositional, six-month, 12-month, and 18-month review hearings. This is because “an appellate court in a dependency proceeding may not inquire into the merits of a prior final appealable order on an appeal from a later appealable order.” (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1151, 1159-1161.)

(2005) 125 Cal.App.4th 831, 839-840.) “It is not our function, of course, to reweigh the evidence or express our independent judgment on the issues before the trial court.” (*In re Jasmon O.* (1994) 8 Cal.4th 398, 423.)

Before a state completely and irrevocably terminates parental rights, due process requires the state to support its allegations of parental unfitness by clear and convincing evidence. (*In re P.A.* (2007) 155 Cal.App.4th 1197, 1211.) “California’s dependency system comports with [due process] requirements because, by the time parental rights are terminated at a section 366.26 hearing, the juvenile court must have made prior findings that the parent was unfit. [Citation.]” (*In re Gladys L.* (2006) 141 Cal.App.4th 845, 848.) “Except for a temporary period, the grounds for initial removal of the child from parental custody have been established under a clear and convincing standard (see § 361, subd. (b)); in addition, there have been a series of hearings involving ongoing reunification efforts and, at each hearing, there was a statutory presumption that the child should be returned to the custody of the parent. (§§ 366.21, subds. (e), (f), 366.22, subd. (a).) Only if, over this entire period of time, the state continually has established that a return of custody to the parent would be detrimental to the child is the section 366.26 stage even reached.” (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 253.) “[T]he purpose of the section 366.26 hearing is not to accumulate further evidence of parental unfitness and danger to the child, but to begin the task of finding the child a permanent alternative family placement. By the time dependency proceedings have reached the stage of a section

366.26 hearing, there have been multiple specific findings of parental unfitness.”

(*Ibid.*, fn. omitted.)

Based on the record before us, we reject father’s contention his due process rights were violated. The facts and circumstances at issue here are distinguishable from those in *P.C.* and *G.S.R.*. First, unlike the appealing parent in *G.S.R.*, father in this case cannot be characterized as a “nonoffending parent.” Second, father’s arguments ignore too much of the record. In our view, the juvenile court’s findings of detriment against father throughout the proceedings satisfied due process, because they were supported by the record and were not based solely on poverty or an inability to obtain suitable housing as in *P.C.* and *G.S.R.*

Initially, the court’s findings of detriment were based on risks to J.C. as a result of domestic violence between mother and father and father’s failure and apparent inability to protect the children from risks caused by mother’s poor mental health. Father attempts to minimize the court’s true finding on the domestic violence allegations in the petition by claiming there is no allegation or evidence of danger to J.C. as a result of the physical altercations between mother and father. However, father’s argument is untenable. Children are impacted by domestic violence “even if they are not the ones being physically stricken by the abuser, because they see and hear the violence and the screaming.” (*In re Heather A.* (1996) 52 Cal.App.4th 183, 192.) “[D]omestic violence in the same household where children are living is neglect; it is a failure to protect [the children] from the substantial risk of encountering the violence and suffering serious physical harm or illness from it.” (*Id.* at p. 194.)

In their initial interviews with the social worker, both mother and father reported incidents of domestic violence between them. The social worker observed injuries on mother, which mother said were the result of a recent physical altercation with father. She also told the social worker she had physical fights with father on other occasions. In a later interview, father told the social worker there were multiple altercations with mother, with mother being the aggressor. According to father, mother would throw things and hit him *while the children were present*.

Father's argument also disregards clear and convincing evidence J.C. was at risk because father had a continuing relationship with mother, which represented a danger to J.C. Father told the social worker he could not take care of the children on his own but would help mother get them back. The social worker repeatedly expressed concerns because mother was not addressing her mental health issues, and there was a pattern of father leaving and then reuniting with mother. On July 5, 2007, father told the social worker mother gets very aggressive at times, is easily agitated, and starts throwing things. Father said mother had a problem with depression, and he lacked confidence in her. However, he was not afraid to leave the children with mother as he did not believe she would harm them. Mother said father was constantly leaving and would disappear for days, leaving her with both children. She also said she believed father had lost confidence in her because he would stand by her side while she was cooking, because he was concerned she forgot to turn on the stove. The social worker expressed concern that father "appears unwilling to explore the possibility of the children getting hurt in the care of their mother due to her mental

health issues.” As a result, the social worker initially concluded the chance for reunification with father was poor.

In an addendum report dated September 11, 2007, the social worker reported father requested visitation without mother after an emotional outburst by mother during visitation. At that time, father said he did not want to be with mother. Father told the social worker he and mother “were together for a year and a half and all they did was fight. He admitted that he had left her several times for days as he could not tolerate her erratic, emotional and violent behavior. He stated he had left the children behind with their mother.” There was also evidence of continued violence between mother and father. The social worker said father “seems to have a good relationship with children at a play level, however, his ability to protect and provide safety to children is questionable. He left the house many times escaping from mother’s erratic, emotional and violent behaviors but he did not realize that he was abandoning the vulnerable children behind in that environment for days, nor did he recognize that the mother’s same behaviors could have endangered the children.”

At the time of the six-month review, father was reportedly still involved with mother, who had not completed any services or had any rehabilitation since the initial removal. The social worker said father “is not in a position to regain custody. . . . He has not demonstrated successful completion of services. He also does not accept responsibility for his role in the removal of the children. He denies that he was involved in aggressive or violent behavior with the mother. He stated that the mother is the one who hit him and caused the problems. . . .”

By the time of the 12-month review on August 18, 2008, there was marked improvement as the social worker reported father was “trying hard,” appeared “eager and motivated,” had completed the counseling and education requirements in his case plan, and had suitable housing. On the other hand, the 12-month review report also states mother told the social worker father continues to “drop in and visit her on occasion” and they have spoken about getting back together. Thus, as late as the 12-month review, the social worker continued to have legitimate concerns about J.C.’s safety because of a continuing relationship with mother and because father had previously expressed a desire not to care for the children himself but to help mother get the children back. Understandably, the social worker stated she needed more time to “accurately assess the situation.” Under these circumstances, the juvenile court was entirely justified in concluding it would be detrimental to return J.C. to father’s custody at that time. Thus, in our view, the requirements of due process were satisfied up to and including the time of the 12-month review hearing, because the record does include clear and convincing evidence of unfitness.

Following the 12-month review hearing and as father’s visitation with J.C. was liberalized, the social worker expressed a number of other concerns in a report filed December 5, 2008, in anticipation of the 18-month review. These issues included father’s employment and housing. The social worker reported father was unemployed and continued to rent a room in a mobilehome from a girlfriend. In this regard, the social worker’s report states in part as follows: “Although the father does reside with a woman who is currently willing to fund his shelter, food and utilities, this does not

demonstrate stability. At this time, the father is not capable of taking full responsibility for his child. To return the child at this time, is likely to result in another removal.” “Given his lack of employment and current living arrangement, the father is not demonstrating the ability to provide for his own needs. He is unable to take full responsibility for the child.” Father contends these and other comments by the court and the social worker indicate the decision to terminate his reunification services and parental rights was improperly based on poverty. However, as we read the record, the social worker’s legitimate concern was stability, not poverty. In addition, the record as a whole demonstrates father’s employment and housing circumstances had little or nothing to do with the final determination to terminate reunification services and parental rights.

In the report filed December 5, 2008, the social worker also expressed concern that J.C. had not developed an appropriate attachment to father despite consistent and unsupervised visitation. The social worker believed there had been “ample time and opportunity” for a significant attachment to develop. However, the child demonstrated marked distress when leaving the foster mother for visitation with father and regression upon returning to the foster home and day care. In addition, J.C. had a suspicious, “dime-sized purple bruise on top of his ear,” which was discovered immediately following a visit with father. A nurse believed the bruise could have been caused by pinching, but the exact cause and time of injury could not be determined. Father denied the injury occurred during visitation. The social worker told father he needed to report any injuries or accidents occurring during his visitation. However,

father did not report the next injury to the social worker, which consisted of a scrape on the top of the child's nose, a small cut under the nose, and a bruise on his forehead. When asked about the injury, father said the child had accidentally fallen off the porch steps. At that time, father was given the benefit of the doubt and visitation was continued. However, the social worker recommended terminating father's reunification services and parental rights, which resulted in a contested hearing on the issues raised in the social worker's report.

During the contested hearing, it became apparent the social worker's main concern was evidence demonstrating liberalized visitation with father had not resulted in the development of natural parent-child bonding. It was her opinion it would be detrimental to return J.C. to father based on "the lack of attachment" to father, as evidenced "by the distress and the conflict the child experiences prior to the visits" and the regression he demonstrates afterward. For example, the social worker testified she had observed a recent visit between father and J.C. in October, and J.C. not only showed signs of distress but also did not show the usual signs of an attachment to father, such as closeness, comfort, affection, and/or an eagerness to see father.

The social worker also testified she observed a marked difference in J.C.'s behavior when visiting in father's home as compared with his behavior in other settings. When she saw J.C. at his day care center with his brother and/or in the presence of his foster parents, "he's a typical happy toddler. He runs around and he explores and laughs and he has a range of affects and he appears to be content." When she observed him during visitation at father's home, she said he had "more of a neutral

kind of disposition,” did not seem engaged in activity. Instead, he appeared to just be “wandering around” with no “emphasis in activities or items that would stimulate him.” Father offered opposing testimony of a positive relationship with J.C., and counsel argued vigorously father’s progress was substantial and would lead to a stronger bond given additional time. However, in the end, the juvenile court decided matters of credibility against father and in favor of the social worker and the other witnesses.

In the court’s experience, the facts here were unusual because J.C. was not bonding with father and was “acting out” after visits. The court noted it would expect to “see some outward manifestation of the building of a bond” as the visitation was increased over time, but it was “clear” that father had only “limited awareness” of J.C.’s “emotional and physical needs.” As a result, the court concluded, “Father hasn’t benefited from the services received.” As other factors in support of its decision, the court cited father’s instability and J.C.’s loss of a sibling relationship with his older half brother.

For a child under the age of three years, reunification services are usually limited to six months after the date the child enters foster care. (§ 361.5, subd. (a).) This limitation on reunification services acknowledges the need for infants and toddlers to move quickly toward permanence and a commitment in a loving home in recognition of their unique developmental needs and their vulnerable stage of development. (*Tonya M. v. Superior Court* (2007) 42 Cal.4th 836, 846-847.) “[C]ourt-ordered services may be extended up to a maximum time period not to

exceed 18 months . . . if it can be shown . . . that the permanent plan for the child is that he or she will be returned and safely maintained in the home within the extended time period.” (§ 361.5, subd. (a)(3).) “[T]he juvenile court has the discretion to terminate the reunification services of a parent at any time after it has ordered them, depending on the circumstances presented.” (*In re Aryanna C.* (2005) 132 Cal.App.4th 1234, 1242.) “The failure of the parent or legal guardian to participate regularly and make substantive progress in court-ordered treatment programs shall be prima facie evidence that return would be detrimental.” (§§ 366.21, subds. (e) & (f), 366.22, subd. (a).) “In making its determination, the court shall review and consider the social worker’s report and recommendations and . . . shall consider the efforts or progress, or both, demonstrated by the parent or legal guardian and the extent to which he or she availed himself or herself of services provided. . . .” (§§ 366.21, subds. (e) & (f), 366.22, subd. (a).)

Here, father received reunification services from September 2007 until February 5, 2009, a period of approximately 16 months. Up until the 12-month review, the record includes clear and convincing evidence of father’s unfitness because of domestic violence, a continuing relationship with mother, which endangered the child, and a failure to protect the child from danger. From that point on, the record contains clear and convincing evidence father was unfit because he did not benefit from services and was unable to consistently and adequately parent J.C., as required by his case plan. It was simply not enough for father to visit consistently and complete the counseling and education components of the case plan. In sum, father’s right to

due process was not violated in this case. The court's successive findings of detriment during the course of the proceeding satisfied due process in that they were tantamount to clear and convincing evidence of unfitness and were not improperly based on poverty alone as in *P.C.* and *G.S.R.* As a result, substantial evidence supports the juvenile court's termination of father's parental rights.

Parental Benefit Exception

Father argues the juvenile court erred when it determined the parental benefit exception in section 366.26, subdivision (c)(1)(B)(i), did not apply because he consistently visited J.C. and because the record "reveals a relationship between [father] and [J.C.] that is very much in the nature of parent-child relationship and important to preserve for [J.C.'s] sake."

" 'Once reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability.' " (*In re Celine R.* (2003) 31 Cal.4th 45, 52.) "The statutory exceptions merely permit the court, in *exceptional circumstances* [citation], to choose an option other than the norm, which remains adoption." (*Id.* at p. 53.) "The parent has the burden to show that the statutory exception applies." (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826.) To meet this burden, it is not enough for the parent to show he or she occupies "a pleasant place" in the child's life (*In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324) or to show "frequent and loving contact." (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418.) The exception does not apply "when a parent has frequent contact with but does not stand in a parental role to the child." (*Id.* at p. 1420.)

For the exception to apply, the parent must show “the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) “The exception must be examined on a case-by-case basis, taking into account the many variables which affect a parent/child bond. The age of the child, the portion of the child's life spent in the parent’s custody, the ‘positive’ or ‘negative’ effect of interaction between parent and child, and the child’s particular needs are some of the variables which logically affect a parent/child bond.” (*Id.* at pp. 575-576.)

For the reasons outlined in the preceding discussion, we disagree with father’s view of the record. Father did not occupy a parental role in J.C.’s life. The evidence of J.C.’s lack of attachment to father was overwhelming. Father had only lived with J.C. for a very brief time. J.C. was only four months old at the time of removal and had lived with his foster parents for most of his two years of life. He not only had a strong bond with his foster parents, he also had a significant attachment to his older half brother who had always lived in the same home. Under the circumstances, we

agree with the juvenile court's conclusion father failed to meet his burden of showing the exception applied.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

KING
J.